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83-524

NO.

in the

Supreme Court

of the

United States

October Term, 1983

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC.,

Appellants,

vs.

COCONUT CREEK CABLE T.V., INC.; WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; and NORMAN RICHMAN,

Appellees.

On Appeal from the Fourth District Court of Appeal for the State of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Florida's cable television "access" statute relating to condominiums, Fla. Stat. Section 718.1232 (1981), which grants to private cable operators the right to install cable television lines over and through private property without provision for compensation, violates the Takings Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

Whether Fla. Stat. Section 718.1232 (1981), construed to allow ingress to private condominium property without the need for invitation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as applied to the facts of this case.

APPLICABILITY OF 28 U.S.C. §2403(b)

Pursuant to United States Supreme Court Rule 28.4.(c), Appellants state that 28 U.S.C. §2403(b) may be applicable to this case. Copies of this jurisdictional statement have been served upon the Attorney General for the State of Florida.

PARTIES TO THE PROCEEDING

Appellants, Defendants below, are: Wynmoor Limited Partnership and Wynmoor Community Council, Inc.

Appellee, Plaintiff below, is: Coconut Creek Cable T.V., Inc.

Other Appellees, which were Intervenors below, are: the Wynmoor Homeowners Association, Inc.; the

Martinique Village II-C Condominium Association, Inc.; and Norman Richman.

Wynmoor Limited Partnership and Wynmoor Community Council, Inc. hereby file this jurisdictional statement as Appellants in this proceeding, and state that:

This is the Appellants' original Designation of Corporate Relationships.

Wynmoor Limited Partnership is a New York limited partnership. Communications and Cable, Inc., a Delaware corporation, is both the general and a limited partner of Wynmoor Limited Partnership, and is a subsidiary of Cenville Development Corp., a Delaware corporation. Other limited partners are: McDonald Douglas Finance Corp., which is a subsidiary of McDonald Douglas Corp.; and CV Investments, Inc., a Florida corporation, which is a wholly-owned subsidiary of Cenville Development Corp.

Appellant, Wynmoor Community Council, Inc., is neither owned by any parent corporation, nor has any subsidiary or affiliate corporations.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision appealed by the Fourth District Court of Appeal for the State of Florida, entered June 29, 1983, 434 So.2d 903 (Fla. Dist. Ct. App. 1983), *App.* 17,[1]

[1] "*App.* _____" refers to the attached Appendix at page "_____".

and the opinion by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, which became final August 25, 1982, *App.* 1-14, are set out in the Appendix hereto. The Florida Supreme Court's decision dismissing Appellants' Petition for Review for lack of jurisdiction, entered July 26, 1983, is also set out in the Appendix, *App.* 15-16.

JURISDICTIONAL GROUNDS

Florida Statute §718.1232 (1981) (sometimes hereafter: "Statute") purports to prevent a condominium developer from denying access to or interfering with a private, franchised cable television operator's installation of cable television lines on condominum property, regardless of the developer's ownership interest in the property. The Statute makes no provision for compensation to be paid the landowner/developer in return for such statutorily mandated access.

The federal constitutional questions were timely raised by Appellants as defenses to an action initiated by Appellee, Coconut Creek Cable T.V., Inc. (hereafter: "Coconut Creek Cable"), which sought a declaration of Coconut Creek Cable's right to enter, and to lay cable within, a condominium community being developed by Appellant Wynmoor Limited Partnership (hereafter: "Developer"). These federal constitutional issues were raised throughout the Florida appellate proceedings leading to this appeal.

On July 9, 1982, the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida decided in favor of Plaintiff-Appellee Coconut Creek Cable. The court ruled that the Statute granted franchised cable television operators access to private property, and that such statutory grant was not in derogation of the Takings Clauses of either the Florida or Federal Constitutions. *App.* 8-9. This decision became final on August 25, 1982, upon denial of Appellants' Motion for Reconsideration.

On June 29, 1983, the Fourth District Court of Appeal for the State of Florida affirmed the Circuit Court's decision, *per curiam* without opinion. *App.* 17-18.

On July 26, 1983, the Florida Supreme Court determined that it lacked the jurisdiction to review the *per curiam* affirmance and indicated that a motion for rehearing would not be entertained. *App.* 15-16. *See Nash v. Florida Industrial Commission, et.al.*, 389 U.S. 235, 237 n.1 (1967); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

Notice of Appeal to this Court was timely filed with the Fourth District Court of Appeal on September 9, 1983. *App.* 19-21.

The appellate jurisdiction of the United States Supreme Court to review the decision of the Fourth District Court of Appeal for the State of Florida is conferred by 28 U.S.C., §1257(2). In addition, the following decisions sustain such appellate jurisdiction: *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____,

102 S.Ct. 3164 (1982); *Kaiser Aetna, et.al. v. United States*, 444 U.S. 164 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portion of the Fifth Amendment to the United States Constitution provides as follows:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V, cl. 3 *and* 4.

The pertinent portion of Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const., amend. XIV, §1.

The Florida Statute at issue here, Fla. Stat. §718.1232 (1981), provides as follows:

> No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide

such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Fla. Stat. §718.1232 (1981).

STATEMENT OF THE CASE

Appellant Developer, Wynmoor Limited Partnership, is in the process of developing a large planned unit development located in Coconut Creek, Florida. The development (hereafter: "Wynmoor" or "Wynmoor Village") is being built in stages, and presently includes a number of discrete areas; each owned and managed by a separate association of condominium unit owners. When completed, Wynmoor will consist of approximately seventeen condominium communities which, although operationally separate, will be linked by eventual common ownership of community-wide facilities and lands to be owned by a "master" association of all Wynmoor unit owners, Appellant Wynmoor Community Council, Inc. (hereafter: "Council").

Pending completion of the development, however, or as a result of conditions imposed by the various declarations of condominium, Appellant Developer presently retains ownership or control of certain lands and facilities within Wynmoor Village. The private internal roadways, large areas of undeveloped land, and all

unsold condominium units at Wynmoor, for example, are owned either by Appellant Developer or by Appellant Council. Access to the Wynmoor property is thus presently under Appellants' ownership or control.

Appellant Council, the master mandatory membership association of all Wynmoor condominium unit owners, is currently controlled by Appellant Developer. The Council's purpose and function is to hold title to some of Wynmoor Village's common facilities; to later receive title from Appellant Developer to certain additional lands and facilities, as the development progresses; and to manage and operate those Wynmoor Village facilities and properties which are beyond the confines, ownership, and control of the various discrete parcels submitted to the condominium form of ownership.

Appellees, Wynmoor Homeowners Association, Inc., Martinique Village II-C Condominium Association, Inc. and Norman Richman (hereafter collectively: "Intervenors") represent respectively, a voluntary "homeowners" association; one of the existing condominium associations, and a condominium unit owner.[2]

Appellee Coconut Creek Cable is the exclusive franchised cable television operator for the Coconut

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[2]Although granted Intervenor status, these Appellees were strictly limited in their ability to frame the issues litigated below. By orders of the trial court, Intervenors were aligned with Plaintiff-Appellee Coconut Creek Cable, and were barred from developing issues beyond those already framed by the pleadings. Thus, the further discussion below with respect to those federal issues raised between Appellants and Appellee Coconut Creek Cable were the only ones litigated, and accordingly are the only ones here on appeal.

Creek, Florida locality in which Wynmoor Village is being built. Prior to its institution of this litigation, Coconut Creek Cable had attempted to gain permission to access certain of the several condominium properties within the development. Such right-of-entry negotiations with individual condominium associations proved fruitless.

Shortly after passage of the Statute here at issue, by letter dated July 13, 1981, *App.* 22-23, Appellee Coconut Creek Cable notified Appellant Council that:

> Pursuant to Section 16, Chapter 718, Florida Statutes (the "Condominium Act") as amended June 25, 1981, and in accordance with [our] obligations under Local [Franchising] Ordinance Number 131-79 [our] representatives will begin installation of its cable within Wynmoor on July 17, 1981, at 8:30 a.m. All wires and cables will be laid underground unless there is a pre-existing powerline, and every effort will be made not to hinder unnecessarily or obstruct the free use of the streets, sidewalks, driveways within Wynmoor during the construction process.

The letter's cited amendment to the Florida Condominium Act is now codified as Fla.Stat.§718.1232 (1981). Arriving, as predicted, with men and equipment on the morning of the 17th, Appellant Council denied Coconut Creek Cable access to Wynmoor property.

A week later, on July 21, 1981, Appellee Coconut Creek Cable filed suit in the Circuit Court in and for Broward County, Florida seeking a judicial declaration of its right to access Wynmoor property under the Statute. Consistently with their letter's stated purpose, Appellee Coconut Creek Cable sought the following relief:

> Enter an Order permanently enjoining and restraining Defendants [Appellants here] . . . from violating or interfering with Plaintiff's [Coconut Creek Cable] legal and constitutional rights, as by denying Plaintiff access to the Wynmoor Village project and obstructing and preventing it from laying its transmission lines therein.

It was on the basis of this clearly-stated interpretation of the Statute that Coconut Creek Cable was denied entry to the Wynmoor property. Appellants then defended against the assertion of statutory access by raising the Statute's unconstitutionality as a taking of private property.

On July 9, 1982, the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida rendered judgment in favor of Appellee Coconut Creek Cable stating:

> The basic issue in this case is whether plaintiff in entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

App. 2, and holding:

> No matter who holds legal title to such [Wynmoor Village] roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor Condominium unit owners and residents, and those who service them, as well as for the use and benefit of the developer during the period of development. Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

App. 7. The trial court enforced this holding by the entry of a permanent injunction preventing the Defendant-Appellants from interfering with Appellee Coconut Creek Cable's ingress to the Wynmoor property, and the solicitation of Wynmoor residents' subscription to its cable services. *App.* 12.

In reaching this decision, the trial court responded to Appellants' constitutional taking arguments by stating:

> In this regard the Court takes special note of the recent decision of the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____, 50 U.S.L.W. 4998 (1982) decided June 30, 1982, upon which defendants rely. There the U.S. Supreme Court held that a New York statute which required an owner of an apartment building to permit the permanent placement of television cables upon his building in return for a one-time

> payment of $1.00 constituted a taking without just compensation. Such decision is not dispositive of the instant case or its issues and does not require the invalidation of §718.1232, Florida Statutes.

App. 8-9. Aware of the *Loretto* decision, the trial court purported to distinguish the case, found defendants' federal constitutional challenges to be "without merit", and granted Coconut Creek Cable the described relief. *App.* 9.

On June 29, 1983, the Fourth District Court of Appeal for the State of Florida affirmed the decision of the trial court, *per curiam* without opinion. *App.* 17-18.

On July 26, 1983, the Florida Supreme Court determined that it lacked the jurisdiction to review the *per curiam* affirmance and, accordingly, dismissed Appellants' Petition for Review. *App.* 15-16.

SUBSTANTIALITY OF THE QUESTION PRESENTED

The teachings of *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____, 102 S.Ct. 3164 (1982) ("*Loretto*"), and *Kaiser Aetna, et. al. v. United States*, 444 U.S. 164 (1979) ("*Kaiser Aetna*") are clear: a private landowner's right to exclude unwanted intrusions by the public is a property right of constitutional proportion deserving of protection and, if destroyed, of compensation.

In *Loretto*, a strikingly similar cable television "access" statute was declared by this Court to require

compensation under the Fifth and Fourteenth Amendments to the United States Constitution. *Loretto*, ____ U.S. ____, 102 S.Ct. at 3179. *Loretto* thus stands for the proposition that a governmentally authorized permanent physical occupation of private property, even if minor, cannot be constitutionally mandated absent just compensation. *Id.* 102 S.Ct. at 3177-78 n. 16. Both the trial court and Florida's Fourth District Court of Appeal were aware of the *Loretto* decision, yet each failed to apply its clear precepts. Only the Florida trial court dealt with the *Loretto* issue in detail, stating:

> The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232 F.S., pronounces no such specific mandate, but expressly announces as a public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus the decision of the Supreme Court in *Loretto* is distinguishable from the instant case, both factually and substantively, and does not require this Court either directly or by implication, to invalidate the Florida statute.

App. 9.

This purported distinction cannot stand in the face of *Loretto's* treatment of the New York statute there

at issue. Comparison of the two statutes reveals that the language in each is almost identical.[3] Both are prohibitory in approach. Neither statute "affirmatively" declares, as opined by the Florida trial court, that the landowner's property "shall be occupied permanently and physically by a stranger". Rather, both statutes operate by simply preventing such landowner from interfering with the installation of cable services; "mandated" installation is the implicit and necessary effect of both the New York and Florida statutes. The "approach" of both statutes is thus identical, the Florida trial court's opinion notwithstanding.

As to "subject matter", it is clear that both the New York and Florida statutes were intended to provide maximum "access" to cable television services, *Loretto*, ____ U.S. ____, 102 S.Ct. at 3170-71; in the words of the Florida court to grant "unfettered access to available cable television service." This concededly valid police power purpose is not, however, sufficient to validate the statute. Under the *Loretto* decision, since the character of the mandated invasion is a "permanent,

---

[3]The New York statute at issue in *Loretto* provided, in pertinent part:

> 1. No Landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, . . .
>
> b. demand or accept payment from any tenant . . . or from any cable television company in exchange [for permitting cable television services on or within his Property].

N.Y. Exec. Law §828 (McKinney Supp. 1982).

physical occupation", there is rather applied a traditional *per se* test. *Id.* 102 S.Ct. at 3175-76. The conclusive result of such test is the finding of a taking requiring compensation. *Id.* The two statutes are thus also identical in intent, purpose, and effect.

Florida's §718.1232, accordingly, is not materially distinguishable from the New York statute found constitutionally wanting in *Loretto.* Indeed, those valid distinctions as do exist between the two statutes were ignored by the Florida courts. The New York statute, for example, contained, in addition to the language quoted above, *see* n. 3, the following:

> 1. No Landlord shall
>
> > b. demand or accept payment . . . *in excess of any amount* which the [State Commission on Cable Television], shall, by regulation, *determine to be reasonable* . . .

N.Y.Exec.Law §828 (McKinney 1982) (emphasis supplied). The New York legislature, by contrast to the Florida legislature, thus expressly recognized the takings ramifications of the access rights they were granting. Notwithstanding, the *Loretto* Court remanded the case for determination of the constitutional sufficiency of the regulatory $1.00 fee which the New York Commission had declared presumptively reasonable under the New York statute. *Id.* 102 S.Ct. at 3170 *and* 3179.

Here, the Florida Statute fails to make even a token, yet insufficient attempt at compensation. The Florida Statute simply contains no such provision. It mimics the operative provisions of the New York statute,

but without any of its constitutional safeguards. In view of §718.1232's clear purpose, its effect to grant cable television access to private property, its ommission of even token compensation, and its breach of the clear tenets of *Loretto*, the Florida Statute here at issue cannot withstand even facial constitutional scrutiny. The purported distinctions offered by the Florida trial court must thus be unavailing, and cannot serve to save the Statute.

Nor are §718.1232's constitutional infirmities only facial. Under the specific facts of this case, the relief so far provided Appellee Coconut Creek Cable, and the trial court's construction of the Statute, §718.1232, as applied, transgresses the constitutional limits described in *Kaiser Aetna*, 444 U.S. 164 (1979). Under the permanent injunction entered below, the Statute has already been construed to extinguish a private landowner's right to exclude from his property uninvited members of the public. As stated by the Florida Circuit Court:

> Another contention advanced by defendants was that plaintiff failed to establish evidentially that large numbers of Wynmoor residents were actively seeking plaintiff's services. Without regard to the accuracy of defendants' characterizations of the evidence, the statute in question, §718.1232 F.S., does *not* require such a showing or impose such a burden upon the provider of cable television service. The heart of the statute is the right of the condominium dweller to have access to available licensed or franchised cable television service *without regard to any measure of the quantity of such persons who may or may not want to*

> *avail themselves of such access.* The evidence in this case discloses that the actions of the defendants have improperly denied that right of access.

App. 9-10 (emphasis supplied).

In so construing the Statute, the Circuit Court rendered it unnecessary for the private, franchised cable television operator to be even an invitee of a condominium unit owner in order to gain ingress to the Wynmoor Village community. This statutory construction of §718.1232 is in clear derogation of Appellant Developer's, and other condominium unit owners', rights to exclude any uninvited person from the private confines of the Wynmoor community.

These exclusionary rights arise, from the various condominium documents attendant the Wynmoor Village development. The documents, for example, grant easements of ingress and egress to all unit owners, their guests, and their invitees. This list is exclusive by implication, and thus logically requires that Appellee Coconut Creek Cable be at least an *invited* vendor in order to gain access to the Wynmoor property. This construction of the documents is physically reinforced by the wall which surrounds the Wynmoor communities, and the limited access to the property thereby afforded.

In spite of this, the Florida trial court held, as quoted above, that no invitation was necessary in Coconut Creek Cable's case. Rather, the Statute, by itself, was sufficient to anoint Plaintiff-Appellee with the requisite status. Aside the problems of statutory construction so

engendered, this partial extinction of the right to exclude, effects, as applied, an unconstitutional taking where, as here, there is a complete absence of compensation for the extinguished exclusionary right. *Cf. Kaiser Aetna*, 444 U.S. at 179-80.

In summary, neither the opinion of the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida, nor its affirmance by the Fourth District Court of Appeal, can be sustained in the face of either *Loretto* or *Kaiser Aetna*. The Florida court decisions thus merit swift and summary reversal by this Court.

CONCLUSION

The decisions below upholding Fla. Stat. §718.1232 (1981) and its governmental grant of rights to third party cable operators to permanently and physically occupy private property should be summarily reversed and remanded to the Fourth District Court of Appeal for the State of Florida for a decision not inconsistent with the tenets of the *Loretto* decision. Alternatively, this Appeal should be accorded plenary review.

Respectfully submitted,

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Appendix

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 81-14304 CL POLEN

COCONUT CREEK CABLE T.V., INC.,

Plaintiff,

vs.

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC.,

Defendants.

and

WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not-for-profit; and NORMAN RICHMAN,

Intervenors.

FINAL JUDGMENT AND DECREE

THIS CAUSE came on for trial before the Court on June 7, 1982 upon plaintiff's complaint for declaratory and injunctive relief. The Court received the testimony and documentary evidence presented by the parties on June 7 and 8. On the morning of June 9, 1982 counsel

for the parties made closing oral arguments. Pursuant to the request of the Court, the parties, through their counsel, on June 28, 1982 presented written post-trial briefs, the defendants having also submitted a brief prior to commencement of the trial.

The basic issue in this case is whether plaintiff is entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

Wynmoor Village (hereinafter "Wynmoor"), originally known as Rossmoor, is a large condominium project which has been and continues to be developed by the defendant, WYNMOOR LIMITED PARTNERSHIP. Wynmoor is located within the City of Coconut Creek, Florida. Presently it consists of approximately 3,500 completed and occupied condominium units, with another 1,500 to 2,000 units planned for the future. Plaintiff is a cable television company. Pursuant to Ordinance No. 131-79 of the City of Coconut Creek, plaintiff is franchised to operate throughout Coconut Creek and to serve all residential units located within that municipality. The validity of the franchise and its stated exclusivity are not issues for determination in this case. Intervenors consist of one resident of Wynmoor, one of the approximately 39 separate condominium associations established within Wynmoor, and a voluntary association of unit owners in Wynmoor. The defendant, WYNMOOR COMMUNITY COUNCIL, is an entity created by the condominium documentation to manage the recreational and other facilities common to all of the associations in the Wynmoor community. The COUNCIL itself is managed by a board of nine members, five of whom are

still appointed by the developer, but all owners of units at Wynmoor are non-voting members of the COUNCIL.

Plaintiff received its franchise on January 24, 1980. Thereafter it had proceeded to lay its cable to service all residential areas in Coconut Creek except Wynmoor. By letter dated July 15, 1981, addressed to the COMMUNITY COUNCIL, plaintiff announced its intent to enter Wynmoor to commence the process of designing and installing its cable television system to service customers within Wynmoor. Upon arrival at one of the only two entrance gates in the wall surrounding Wynmoor on July 17, 1981, plaintiff's representatives and equipment trucks were barred from entry. Defendants ultimately justified such act by claiming (1) that the roads in Wynmoor are private and under control of defendants and (2) that cable television is already exclusively provided to the residents of Wynmoor by Computer Cable T.V., Inc. a wholly-owned affiliate of WYNMOOR LIMITED PARTNERSHIP.

Upon being barred from the Wynmoor complex, plaintiff filed this action seeking a declaration of its right to enter Wynmoor and further seeking injunctive relief against defendants to prevent further interference by them with such right. Plaintiff premised its claim upon the common law, its franchise from Coconut Creek and Section 718.1232, Florida Statutes, which provides as follows:

> —No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident

> or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Defendants countered that the foregoing statute was unconstitutional, facially or as applied, in that it impaired existing contracts, denied equal protection and resulted in a taking of defendant's property without due process.

The intervenors essentially supported plaintiff's claim to a right of entry under the statute and contested the legality of the defendants' acts in denying such entry.

Plaintiff presented the testimony of two of its representatives, Arthur Bellis and Anthony Genova, concerning its activities to date in Coconut Creek under the franchise ordinance. Mr. Genova also testified in general as to the various methods and ways utilized by plaintiff in the past to reach private subscribers, including the use of utility easements in some instances.

Plaintiff also called, as an adverse party witness, Mr. James Coffey, president of WYNMOOR COMMUNITY COUNCIL and president of Computer Cable T.V. Mr. Coffey admitted that plaintiff was stopped at the Wynmoor entrance gate pursuant to his direction.

He further stated that in July 1981 no cable television service such as plaintiff offers was then available to Wynmoor residents. Under the contracts between Computer Cable and the Wynmoor residents, copies of which defendants offered into evidence, the unit owners receive a security alarm system and television service from a master antenna which provides all regular "off-the-air" television broadcast channels, such as NBC, CBS, ABC, WCIX, WPBT and the like, but which does not provide satellite television reception or programming such as it offered by HBO, Movie Channel, Cinemax, USA, ESPN, CNN, USA Channel or Showtime, i.e. entertainment and sports "pay TV" channels.

It is clear from the evidence that the referenced Computer Cable contracts do not encompass such satellite television service and that residents of Wynmoor have been expressing a desire to have such service available for at least two years prior to July 1981. Mr. Coffey testified that after this action commenced, and while it was pending, a representative of the WYNMOOR LIMITED PARTNERSHIP made arrangements with a company known as Earthstar Communications to offer such services to Wynmoor residents commencing in January 1982. In short, Earthstar was granted access as plaintiff was being denied access. As of the time of trial, Earthstar had signed up approximately 100 units in Wynmoor. Testimony from three Wynmoor residents confirmed their interest in having available the services offered by plaintiff.

Without attempting to recount herein all the relevant facts and evidentiary matter presented for the Court's consideration, the foregoing at least provides a setting

for the conclusions and orders which follow. Based upon the record in this cause, including the pleadings and all the evidence, testimonial and documentary, the Court finds and concludes as follows:

1. Plaintiff, as a licensed and franchised provider of cable television services, is clearly entitled under law to have entry into Wynmoor Village and to have full access to its various condominium associations and to their individual unit owners and residents. Plaintiff's right of entry and access is supported, *inter alia*, by its franchise from the City of Coconut Creek, of which Wynmoor is a part, and by the provisions of Section 718.1232, Florida Statutes. Only by allowing plaintiff entry into Wynmoor can the residents of that condominium complex have the access to plaintiff's services which the law and the statute authorize and guarantee.

2. Defendants' actions in barring plaintiff to date are without legal cause or justification and are, therefore, wrongful. Such actions must cease forthwith. Defendants, and their affiliates, through their officers, servants, agents, employees and representatives, should not in the future interfere with plaintiff's entry into Wynmoor or with plaintiff's reasonable efforts to design and plan the installation of its system at Wynmoor and to communicate with and solicit Wynmoor condominium associations and residents for service.

As a consequence, plaintiff is entitled to certain injunctive relief which is delineated more fully hereafter. Plaintiff has no adequate remedy at law and will suffer irreparable damage unless its right of entry or access

is not only declared but enforced and supported by said injunctions. Moreover, the Court cannot ignore the considerations for the public interest which exist in this case by virtue of the municipal franchise, the public policy enunciated in Section 718.1232, and the sizeable number of condominium dwellers affected.

a. At the trial, intervenors and defendants disputed who legally owned and controlled the roadway system in Wynmoor. The evidence upon that subject was also somewhat in dispute. This Court makes no finding upon that issue because none is required in this case. No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them, as well as for the use and benefit of the developer during the period of development. Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

b. The Court does not reach the constitutional issues raised by defendants because the facts of this case do not support such challenges to the validity of Section 718.1232, Florida Statutes.

(1) The defendants are not parties to the contracts between Computer Cable and the individual units. Besides, those contracts, and others to which the defendant, WYNMOOR LIMITED PARTNERSHIP, is a nominal party, do not cover the subject of satellite or "pay" television. Therefore,

there is no contract impairment in fact. In addition, the subject statute in no way mandates that a unit owner must use plaintiff's services, and there was no evidence presented that a unit owner would terminate his contract with Computer Cable even if he did.

(2) Section 718.1232 does not discriminate against the provision of cable television services by entities other than the plaintiff. It simply announces the policy of the state that condominium owners and residents shall have access to such services when the same are available, as is the case here.

(3) Nor does the subject statute either by its terms or under the facts existent in this case, constitute or result in a taking of defendants' property without due process or just compensation in any sense. As noted, nothing in the language of the statute mandates the use of plaintiff's services to the exclusion of any others or requires the abrogation of any valid and enforceable contracts.

In this regard the Court takes special note of the recent decision of the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, ___ U.S. ___, 50 LW 4998 (1982) decided June 30, 1982, upon which defendants rely. There the U.S. Supreme Court held that a New York statute which required the owner of an apartment building to permit the permanent placement of television cables upon his building in return for a one-time payment of $1 constituted a taking without just compensation. Such decision is not dispositive of

the instant case or its issues and does not require an invalidation of Section 718.1232, Florida Statutes.

The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232, F.S., pronounces no such specific mandate, but expressly announces as public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus, the decision of the U.S. Supreme Court in *Loretto* is distinguishable from the instant case, both factually and substantively, and does not require this Court, either directly or by implication, to invalidate the Florida Statute.

In sum, with or without the lessons of *Loretto*, the Court finds that the constitutional challenges of defendants to Section 718.1232, F.S., are without merit, especially since the facts of this case fail to demonstrate clearly that the defendants have proper standing to raise such challenges anyway.

3. Another contention advanced by defendants was that plaintiff failed to establish evidentially that large numbers of Wynmoor residents were actively seeking plaintiff's services. Without regard to the accuracy of defendants' characterization of the evidence, the statute in question, Section 718.1232, F.S., does not require such a showing or impose such a burden upon the provider of cable television service. The heart of

the statute is the right of condominium dweller to have access to available licensed or franchised cable television service without regard to any measure of the quantity of such persons who may or may not want to avail themselves of such access. The evidence in this case discloses that the actions of the defendants have improperly denied that right of access.

4. During the course of the trial certain evidence was presented with regard to easements and other agreements for right-of-way or right of entry, which, arguably, could be utilized by plaintiff in the physical location or installation of its cable television system within Wynmoor. The Court understood such evidence to be in the nature of general information about the mechanics of installing such a system because the evidence was also clear that until plaintiff was permitted entry into Wynmoor, it could not actually design or tailor a system for that complex. Accordingly, by this final decree the court does not rule upon the issue of the availability or non-availability, in whole or in part, to plaintiff of any particular easement or right-of-way within Wynmoor. Such specifics are not now before the Court, and indeed, may not, as a practical matter, ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the WYNMOOR COMMUNITY COUNCIL. In like manner, the Court by this final decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wynmoor. Such matter,

should the same became a legal problem at all, will depend upon subsequent events.

5. The Court has considered seriously plaintiff's request that defendants be enjoined for a period of time, not to exceed five months, from assisting Earthstar Communications or other entities competitive to plaintiff from soliciting Wynmoor unit owners or residents or otherwise providing them with competitive cable television service. The Court recognizes that by denying plaintiff access into Wynmoor in July 1981, when no such services competitive to plaintiff then existed, and by making arrangements with Earthstar for such services during the pendency of this litigation, the developer, WYNMOOR LIMITED PARTNERSHIP, through its subsidiary or affiliate, Computer Cable, may have gained for itself, or those with whom it is corporately intimate, some competitive advantage over plaintiff that would not otherwise have existed had defendants acted properly in the first instance. Despite the Court's sympathy for plaintiff's plight in such regard, nevertheless the Court declines to grant such relief on a permanent basis fearing that it would thereby unduly, albeit indirectly, enjoin the activities of non-parties and trusting that, in the wake of this decision and in the last analysis, the forces of the market place eventually will fairly determine any competitive contest.

WHEREFORE, in view of the foregoing findings and conclusions, the Court does hereby ORDER, ADJUDGE AND DECREE the following:

A. Under the law and facts of this case plaintiff has established its right, pursuant to Section 718.1232,

Florida Statutes, and otherwise, to enter Wynmoor in order that the condominium unit owners and residents of Wynmoor may have access to plaintiff's franchised cable television service.

B. Defendants have wrongfully denied such entry or access since July 17, 1981 and defendants and their officers, agents, representatives, employees and servants, together with all others encompassed by the scope of Rule 1.610(d), Florida Rules of Civil Procedure, (collectively "defendants") are hereby forthwith permanently enjoined from denying such entry or access to or otherwise interfering with plaintiff or its officers, agents, servants, employees or representatives (collectively "plaintiff") in the exercise of such right of entry and access. The scope and intent of this injunction and decree is such that plaintiff shall have the right to enter Wynmoor in order to survey and inspect the property for purposes of planning the design and installation of a system to furnish cable television service to the unit owner and residents of Wynmoor and shall have the further right to solicit customers and otherwise negotiate the terms, means and methods of providing service with unit owners, residents, and condominium associations located within Wynmoor, and defendants are permanently enjoined from interfering with the foregoing activities by Plaintiff.

C. This decree and the injunctions herein contained shall not take effect until the disposition by this Court of any proper and timely motions for rehearing which may be filed by any party. Should

any such motions be filed herein, the parties are hereby notified that the same shall be heard by the Court on August 18, 1982 at 11:00 a.m.

D. The preliminary injunction entered by this Court on January 14, 1982 shall, as a consequence, remain in force until this Final Judgment and Decree takes effect.

E. This Court reserves jurisdiction over this cause and the parties hereto for the purpose of making such determinations and taking such actions as may be judicially appropriate to assure meaningful access between plaintiff and the unit owners of Wynmoor consistent with Sections 718.1232, Florida Statutes, and the terms of this Final Judgment and Decree.

F. The Court further reserves jurisdiction over this action for the purpose of taxing costs against defendants by subsequent order after hearing upon proper motion.

DONE AND ORDERED this 9 day of July, 1982.

Mark E. Polen
CIRCUIT JUDGE

Copies Furnished Counsel

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Attorneys for Plaintiff

IN THE SUPREME COURT OF FLORIDA

TUESDAY JULY 26, 1983

CASE NO. 64,024

District Court of Appeal,
4th District – Nos. 82-825
& 82-1798

WYNMOOR LIMITED PARTNERSHIP and
WYNMOOR COMMUNITY COUNCIL, INC.,
Petitioners,

vs.

COCONUT CREEK CABLE T.V., INC., ET AL.,
Respondents.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Dubline Causseaux
Deputy Clerk

C

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark E. Polen, Judge

David M. Orshefsky, Esquire
Edward J. Campbell, Esquire
J. Cameron Story, III, Esquire
Mark B. Schorr, Esquire

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1983

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF

CASE NOS. 82-825 &
82-1798

WYNMOOR LIMITED PARTNERSHIP, and
WYNMOOR COMMUNITY COUNCIL, INC.,
Appellants,

v.

COCONUT CREEK CABLE TV., INC., et al.,
Appellees.

Decision filed June 29, 1983

Consolidated Appeals from the Circuit Court for Broward County; Mark E. Polen, Judge.

Terrence Russell, David M. Orshefsky and Robert A. Plafsky of Ruden, Barnett, McClosky, Schuster & Russell, P.A., Fort Lauderdale, for appellants.

Davis W. Duke, Jr., and J. Cameron Story, III of McCune, Hiaasen, Crum, Ferris & Gardner, P.A., Fort Lauderdale for appellee-Coconut Creek Cable T.V., Inc.

Mark B. Schorr of Becker, Poliakoff & Streitfeld, P.A., Fort Lauderdale, for appellees-Wynmoor Homeowners Association, Inc., Martinique Village II-C Condominium Association, Inc., and Norman Richman.

PER CURIAM

AFFIRM.

GLICKSTEIN, HURLEY, and DELL, JJ., concur.

[RECEIVED '83 SEP – 9]

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 82-1798
[Consolidated with
CASE NO. 82-825]

WYNMOOR LIMITED PARTNERSHIP and
WYNMOOR COMMUNITY COUNCIL, INC.,
Appellants,

v.

COCONUT CREEK CABLE T.V., INC., WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; and NORMAN RICHMAN,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC., Appellants herein and Defendant below, hereby appeal to the Supreme Court of the United States from the final order of this Court affirming the decision below, entered herein on June 29, 1983.

This appeal is taken pursuant to 28 U.S.C., §1257(2).

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By: /s/ Terrence Russell
TERRENCE RUSSELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished by U.S. Mail to EDWARD J. CAMPBELL, ESQ., Levy, Shapiro, Keen & Kingcade, P.O. Box 2755, 218 Royal Palm Way, Palm Beach, Florida 33480; J. CAMERON STORY, III, ESQ., McCune, Hiaasen, Crum, Ferris & Gardner, P.O. Box 14636, 25 South Andrews Avenue, Fort Lauderdale, Florida 33302; MARK B. SCHORR, ESQ., Becker, Poliakoff & Streitfeld, P.A., 6520 North Andrews Avenue, P.O.

Box 9057, Fort Lauderdale, Florida 33310; this 9 day of September, 1983.

TERRENCE RUSSELL, ESQ.
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By: /s/ Terrence Russell
TERRENCE RUSSELL

[RECEIVED BY APPELLANT COUNCIL 7-14-81]
July 13, 1981

Mr. Jim Coffey, President
Wynmoor Community Council, Inc.
333 Coconut Creek Parkway
Coconut Creek, Florida 33066

Dear Mr. Coffey:

Our company, Coconut Creek Cable TV, Inc., is a Florida corporation engaged in the business of operating and maintaining a cable television transmission system in the City of Coconut Creek, Florida. The Company has been granted a franchise by the City Council of the City of Coconut Creek to operate and maintain a CATV System and to construct, operate and maintain such a system upon the streets, alleys, canals, easements, public ways and places within the City.

Pursuant to Section 16, Chapter 718, Florida Statutes (the "Condominium Act") as amended June 25, 1981 and in accordance with the Company's obligations under Local Ordinance No. 131-79, representatives of the Company shall begin installation of its cable within Wynmoor on July 17, 1981 at 8:30 a.m. All wires and cables will be laid underground unless there is a pre-existing electric or power line and every effort will be made not to hinder unnecessarily or obstruct the free use of the streets, sidewalks, driveways within Wynmoor during the construction process.

We anticipate that service can begin to the residents of Wynmoor within thirty days after construction begins. If you have any questions, please don't hestitate to call the undersigned.

Sincerely,

COCONUT CREEK CABLE TV, INC.

Anthony J. Genova
President